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No. 84-2023

In the Supreme Court of the United States

OCTOBER TERM, 1985

INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC., ET AL., PETITIONERS

v.

MARINE MIDLAND BANK, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

Whether a national bank that neither owns nor rents an automatic teller machine to which the bank's customers have access has "establish[ed]" or is "operat[ing]" a "branch" bank within the meaning of 12 U.S.C. 36(c).

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent Wegmans Food Markets, Inc. (Wegmans) owns a chain of grocery stores in New York State. In 1983, Wegmans purchased and installed automatic teller machines (ATMs) in 31 of its grocery stores, including its store in Canandaigua, New York. Wegmans installed these ATMs to attract customers and thus to "support a high-volume grocery business." Pet. App. 8a. Its machines are so-

called "shared ATMs," which means that they may be used by the customers of many financial institutions (*ibid.*).

In January 1983, Wegmans entered into a contract with respondent Marine Midland Bank (Marine), a national bank. Under the agreement, Marine's customers are permitted to use Wegmans' ATM to make cash withdrawals and deposits, obtain cash advances from credit cards, transfer funds between accounts, pay bills, and obtain account balance information. Pet. App. 8a. Marine pays Wegmans a transaction fee each time the ATM is used by a Marine customer (*id.* at 25a-26a).[1] Pursuant to the agreement, Wegmans is required to load the ATM with its own money, provide deposit envelopes and other customer forms, issue transaction receipts, unload and deliver deposit containers, and provide security, insurance, and maintenance services (*id.* at 8a).[2] The ATM in the Canandaigua store also bears Wegmans' logo (*ibid.*).

At the time this action was filed, a number of financial institutions in addition to Marine had ac-

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[1] A customer uses the ATM by inserting an encoded plastic card and entering an identification number. The customer then selects one of the transactions listed on the ATM's keyboard. Deposits are placed in an envelope and dropped through a slot in the machine into a secured box maintained by Wegmans. Before a cash withdrawal may be made the amount sought must be approved electronically by Marine. See Pet. App. 9a. When the transaction is approved, the customer's account is debited and Wegmans' account is credited in the identical amount. Wegmans' account also is automatically credited with the transaction fee. *Id.* at 37a.

[2] Marine evidently is responsible for emptying the deposit containers (Pet. App. 36a).

cess to Wegmans' ATM in Canandaigua. These included state banks, national banks, savings and loan associations, and credit unions. See Pet. App. 9a; *Status of ATM's Under State Branching Laws: Hearings on S. 2898 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 98th Cong., 2d Sess. 67 n.7 (1984) [hereinafter cited as *ATM Hearings*]. Wegmans, Marine, and these other financial institutions all are members of a shared ATM network known as HarMoney. A customer of a banking institution that belongs to HarMoney may use any member's ATM to transact business with his bank (Pet. App. 9a); the members of HarMoney share the use of central computer processing facilities owned by Marine (*ibid.*).[3]

2. Petitioner Canandaigua National Bank (Canandaigua Bank) has its principal place of business in Canandaigua, which has a population of approximately 11,000 people (Pet. App. 8a). Canandaigua Bank therefore is protected by New York's policy of bank home office protection, which prohibits any bank from opening a branch in a city or village that has a population of 50,000 or less, when that city or village already is the principal place of business of another bank. See N.Y. Banking Law § 105 (McKinney 1971 & Supp. 1986).[4] Petitioner Independent Bank-

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[3] Wegmans also belongs to Metroteller, another shared ATM network. Forty-five financial institutions, both in New York and other states, participate in the Metroteller system. Customers of Metroteller can transact business at any Metroteller ATM in any state. See Pet. App. A9.

[4] In addition, New York recently has adopted statutes and regulations specifically regulating the geographical location of shared ATMs. See page 17, *infra*.

ers Association of New York State, Inc. (IBA), is a trade association of over 90 national and state banks, including Canandaigua Bank. Pet. App. 9a.

In 1983, petitioners brought this action in the United States District Court for the Western District of New York, alleging that Marine was violating the branching provisions of the McFadden Act (the Act), 12 U.S.C. 36(c).[5] The Act defines the term "branch" to include all bank offices "at which deposits are received, or checks paid, or money lent" (12 U.S.C. 36(f)). It then permits any national bank, with the approval of the Comptroller of the Currency, to "establish and operate" branches in the state in which the bank's main office is located—but only to the extent that "such establishment and operation are at the time authorized to State banks by the statute law of the State in question." 12 U.S.C. 36(c)(2). See *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 259-260 (1966). Petitioners claimed that by participating in the use of Wegmans' shared ATM in Canandaigua, Marine had established and was operating a branch within the meaning of Section 36(c) of the Act. Because branching by Marine in Canandaigua concededly is prohibited by state law, petitioners concluded that Marine was in violation of Section 36(c).

The district court granted petitioners summary judgment (Pet. App. 31a-47a). The court reasoned

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[5] Petitioners also claimed that Wegmans was involved in the banking business in violation of state law. The district court exercised pendent jurisdiction over this state-law claim and rejected it. See Pet. App. 47a-49a. The court of appeals vacated this portion of the district court's ruling, holding that the district court erred in exercising pendent jurisdiction (*id.* at 26a-30a). This issue is not now before the Court.

that bank-owned ATMs generally are recognized to be branches within the meaning of the Act (*id.* at 40a). And the court found it irrelevant that the ATM at issue here is owned and operated by Wegmans, explaining that "Wegman's [*sic*], its ATM and the HarMoney system only provide a vehicle for the bank and its customers to do business" (*id.* at 43a). For that reason, the court refused to give force to a regulation promulgated by the Comptroller of the Currency that includes within the definition of a "branch" only those ATMs that are owned or rented by the bank (*id.* at 41a-42a). Because New York law prohibits branching in Canandaigua, the court accordingly held that "Section 36(c) prohibits Marine's utilization of the Wegman's [*sic*] ATM in that City" (Pet. App. 47a).

3. The court of appeals reversed (Pet. App. 4a-30a). The court recognized that ATMs that are owned and operated by banks are branches, and thus are subject to the Act's restrictions (*id.* at 15a). But the court also noted that the Act limits only the extent to which a national bank may " 'establish and operate new branches' " (*id.* at 10a). The court therefore identified as "the key issue" in this case whether "the shared ATM in the Wegmans store in Canandaigua is a branch *established and operated by Marine*" (*id.* at 17a (emphasis added)).

In resolving this issue, the court found neither the language nor the legislative history of the Act determinative when applied against the novel background of computerized banking technology (Pet. App. 16a-21a).[6] At the same time, the court ex-

[6] The court noted that "[t]he meaning of the phrase 'establish and operate' is affected by the ambiguity of the definition of its object, 'branch' " (Pet. App. 18a).

plained that a branch plainly is not "established" every time one of Section 36(c)'s three enumerated branching functions is performed: for example, the court pointed out, neither a store that cashes customer checks nor a personal computer that allows a customer to bank at home is a branch within the meaning of the Act (Pet. App. 19a). The court accordingly turned to the Comptroller's interpretation of the Act, finding deference to the Comptroller's views "particularly appropriate here" because "[f]ashioning policies in response to events that were unforeseeable when the legislation was written is one of the primary functions of executive agencies" (*id.* at 22a).

The court noted that the Comptroller has promulgated a regulation providing that an ATM should be deemed to be a branch established by a bank only if it is owned or rented by the bank. 12 C.F.R. 5.31(b). This interpretation of the statute, the court concluded, is not only a permissible one, but "in fact appears to promote the purposes of the McFadden Act." Pet. App. 22a. The court observed that Congress has legislated in the banking area several times since the Comptroller's adoption of the "owned or rented" test, but has declined to disapprove his interpretation (*id.* at 23a); moreover, national banks and other institutions have relied on the Comptroller's decade-old approach in creating substantial ATM networks (*id.* at 22a-23a). The court of appeals also found the Comptroller's interpretation squarely supported by *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976) (Pet. App. 24a). And the court concluded that there are significant differences between "a Wegmans machine and a Marine branch office" (*id.* at 23a): Marine chooses the locations for and

maintains its branches, and "publicly identifies the facilit[ies] as its own" (*id.* at 23a-24a), while Wegmans maintains and regulates the access to *its* machines and is understood by the public to be the owner of the ATMs in its stores (*id.* at 24a).

Finally, the court explained that, without the "owned or rented" limitation, "the definition of 'branch' would be broad enough to include almost any means of communicating instructions to a bank and in theory could bar such accepted conveniences as banking by mail and banking by telephone" (Pet. App. 24a). If Congress believes that the line drawn by the Comptroller is an unacceptable one, the court concluded, it is free to adopt a legislative solution to the branching problems posed by the development of electronic banking (*id.* at 25a).[7]

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[7] The court rejected petitioners' argument that the transaction fees paid by Marine to Wegmans constituted rent within the meaning of the Comptroller's regulation, explaining that payment of the fees does "not grant Marine * * * any proprietary or leasehold interest in the machine * * *" (Pet. App. 25a-26a). The court thus concluded that the fee was "akin to the charge incurred for a phone call" (*ibid.*). The court also was unpersuaded by petitioners' assertion that the Comptroller's reading of the Act would give national banks an unfair competitive advantage over state banks. The court noted that many state banks—including banks that are members of petitioner IBA—belong to ATM networks that offer banking services on an interstate basis (*id.* at 21a). If shared ATMs are branches within the meaning of the Act, however, national banks would be foreclosed from using them to provide services interstate, because the Act permits a national bank to branch only in the state in which its principal office "is situated" (12 U.S.C. 36(c)(2)). The court therefore found that petitioners' reading of the statute would place *national banks* at a competitive disadvantage.

ARGUMENT

In our view, review by this Court of the question presented here is not warranted. While the issues involved in this case are potentially significant ones for the banking industry, those issues were resolved correctly by the court of appeals. Further consideration of the court of appeals' holding would, moreover, be premature: the decision below—as petitioners acknowledge (Pet. 10, 16)—is one of first impression; its practical effects are likely to be quite limited; and Congress currently is considering bills that would deal with the precise area of the law at issue in this case.

1. a. Section 36(c) limits the places where a national bank may "establish and operate" branches. Thus, as petitioners acknowledge (Pet. i, 3), the critical question here is whether a national bank whose customers may use a shared ATM that the bank does not own or rent has "establish[ed]" or is "operat[ing]" a new branch. While the Act does not define the terms "establish" or "operate," [8] the Comptroller has concluded that they are satisfied only when the bank owns or rents the ATM at issue. 12 C.F.R. 5.31(b).

In the circumstances of this case, the Comptroller's interpretation should be dispositive. See generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). His reading plainly accords with the ordinary meaning of the statutory language. Marine did not "establish" the ATM in Wegmans' store: Wegmans

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[8] Similarly, there appears to be nothing in the legislative history of the Act that bears directly on the meaning of those terms.

purchased and installed the ATM for the sole purpose of attracting grocery customers. See Pet. App. 8a. Nor does Marine operate Wegmans' ATM in any meaningful sense. Wegmans services the ATM, fills it with cash, and is responsible for its security and maintenance. *Ibid.*

While petitioners suggest that Wegmans' role in operating the ATM is nothing more than a matter of form (Pet. 15),[9] the court of appeals correctly recognized that proper consideration of Wegmans' involvement underscores the important substantive distinctions between a shared ATM and a branch office established by a bank. Thus, it is Wegmans that determines where the ATM is located, a judgment that is dictated not by "banking needs" (Pet. App. 23a-24a) but by the demands of the grocery business. It is Wegmans that decides who may use the ATM and that sets the conditions attached to its use. It is Wegmans that has the option of removing the ATM altogether. And the ATM is marked with Wegmans' logo. Given these factors, customers plainly—and properly—"do not view the machine as belonging to Marine." *Ibid.*[10]

Indeed, as the court of appeals explained (Pet. App. 18a-19a, 23a-24a), the Comptroller's "owned or

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[9] There has been no suggestion in this case that the Marine-Wegmans agreement was a sham, or that Wegmans was not in fact motivated entirely by considerations relating to the grocery business when it installed the Canandaigua ATM.

[10] For similar reasons, the court of appeals was correct in ruling (Pet. App. 25a-26a) that the transaction fee paid by Marine is not "rent." Payment of the fee gives Marine no property interest in the ATM; it is simply a per-unit payment for access that, as the court of appeals noted, is "akin to the charge incurred for a phone call" (*id.* at 26a).

rented" test draws a *necessary* line between those bank offices that are branches and other, indisputably nonbranch sites at which banking transactions are performed. Under petitioners' reading of the statute, any place at which a banking customer is able to cash a check, make a deposit, or obtain a loan would be considered a branch. But such a sweeping reading of the Act would mean that telephones, mail boxes, electronic devices used to transfer funds, or grocery stores that cash checks would, for the first time, be considered branches that are subject to the Act's restrictions. See *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921, 941, 947 n.98 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976). Similarly, rejection of the Comptroller's "owned or rented" test would call into question the propriety of correspondent banking relationships, which permit a bank's customers to obtain cash away from the bank's main office by cashing checks at correspondent institutions. See *ATM Hearings* 166-167. And it would have a profoundly negative effect on the development of new banking technology, such as home computer banking and so-called point-of-sale terminal systems (see Pet. App. 19a), which apparently would be treated as branches by petitioners. In these circumstances, where fine lines must be drawn in the face of changing industry practice and developing technology, deference to the Comptroller's reasonable judgment is particularly appropriate. See, *e.g.*, *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 309-310 (1953).[11]

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[11] Petitioners' claim (Pet. 20) that the Comptroller's views are not owed deference is plainly without merit. See *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 621 (1971). Equally flawed is their assertion (Pet. 21) that the Comptroller's

b. That the Comptroller's conclusion should not be disturbed here is confirmed by a look at developments in the banking industry and at recent congressional action. As the court of appeals noted (Pet. App. 15a-16a), the Comptroller announced the "owned or rented" test in 1976, and consistently has applied the standard since that time in approving the use of shared ATMs by hundreds of national banks.[12] Dur-

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interpretation "directly conflicts" with the approach taken by the Federal Reserve Board. The Board consistently has approved ATM sharing arrangements identical to those at issue here. See *Centerre Bancorporation*, 69 Fed. Res. Bull. 643 (1983); *Atlantic Bancorporation*, 69 Fed. Res. Bull. 639 (1983). The Board's earlier decision in *Michigan National Corp.*, 67 Fed. Res. Bull. 127 (1978), cited by petitioners (Pet. 21), involved several national banks owned by a single bank holding company; the banks allowed their customers to conduct business at each other's main offices and "brick and mortar branches" in violation of state law. In that situation the banks had, through common ownership, established and operated the branch offices. Finally, petitioners are incorrect in asserting (Pet. 20, 24 n.16) that the Comptroller's regulation is somehow inconsistent with 12 U.S.C. 93a. That statute was intended to make it clear that the Comptroller lacks the authority "to permit otherwise impermissible activities of national banks with specific reference to the provisions of the McFadden Act * * *." H.R. Conf. Rep. 96-842, 96th Cong., 2d Sess. 83 (1980). See 126 Cong. Rec. 6901-6902 (1980). 12 C.F.R. 5.31 confers no such novel authority upon national banks.

[12] Petitioners' suggestion (Pet. 22-23) that the Comptroller's "owned or rented" policy was first announced in 1980 is factually incorrect. While the Comptroller formally codified the "owned or rented" approach in 1982 (see 47 Fed. Reg. 29826, codified at 12 C.F.R. 5.31), it was adopted in 1976 and reaffirmed in a series of interpretive letters. See 41 Fed. Reg. 48333; N. Penney & D. Baker, *The Law of Electronic Fund Transfer Systems* ¶ 22.01[1][c], at 22-9 to 22-10 & nn.32-33 (1980); Pet. App. 15a-16a.

ing that period, the banking industry and other institutions have relied on the Comptroller's reading of the Act in establishing the approximately 200 shared ATM networks that now exist across the nation. See *ATM Hearings* 19, 52-53, 106, 150-151. The prospect of displacing these substantial reliance interests plainly counsels that "the longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons' " of a sort that have not been advanced by petitioners. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-458 (1978), quoting *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921).

Similarly, since 1976 Congress on three separate occasions has adopted legislation dealing with the Act generally, and with electronic banking and ATMs in particular. See International Banking Act of 1978, Pub. L. No. 95-369, 92 Stat. 607 *et seq.*; Electronic Fund Transfer Act, Pub. L. No. 95-630, 92 Stat. 3728; Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469.[13] Yet Congress at no point displaced or otherwise disapproved of the Comptroller's publicly stated approach. This sort of congressional acquiesence in a longstanding administrative practice suggests that the agency's interpretation should be deemed authoritative. See, *e.g.*, *Connecticut Department of Income Maintenance* v. *Heckler*, No. 83-2136 (May 20, 1985), slip op. 7, 13;

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[13] The International Banking Act directed the President to report to Congress on the McFadden Act's applicability to "the present financial, banking and economic environment" (92 Stat. 625); the Electronic Fund Transfer Act established the rights of participants in electronic funds transfer systems (see 15 U.S.C. 1693(b)); the Garn-St Germain Act, among other things, permitted savings and loan associations to establish ATMs nationwide (12 U.S.C. 1464(b)(1)(F)).

United States v. *Rutherford*, 442 U.S. 544, 554 (1979).

c. The Comptroller's reading of the statute—and the decision below—also is consistent with the only other judicial authority addressing the issue here, *Independent Bankers Ass'n of America* v. *Smith*, *supra*. In *Smith*, the District of Columbia Circuit held that an ATM *owned* by a bank was a branch, specifically relying on the fact that the ATM was "established (*i.e.*, owned or rented) by the national bank." 534 F.2d at 951. Petitioners' suggestion to the contrary (Pet. 26-27) notwithstanding, the "owned or rented" distinction drawn in *Smith* was central to the reasoning in that case. The court recognized that bank customers frequently make deposits or conduct other banking transactions by telephone or mail. The court distinguished these non-branch methods of banking from the ATM at issue in *Smith* on the ground that the former involved "no place or facility established (*i.e.*, *owned or rented*) by a bank." 534 F.2d at 941 (emphasis added). Indeed, it was on this basis that the court in *Smith* distinguished a grocery store providing check-cashing services—essentially the services offered by Wegmans' ATM—reasoning that "*the store* provides this convenience to its customers * * * to retain old and attract new patronage." *Id.* at 947 n.98 (emphasis in original).[14]

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[14] Similarly, petitioners are incorrect in asserting (Pet. 16-19) that the decision below conflicts with this Court's decision in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969). In *Plant City*, the Court held that two off-premises banking services—an armored car messenger service that received cash and checks for deposit and a stationary receptacle for customer deposits—were branches. The Court left no doubt in *Plant City* that the facilities were "owned and con-

2. a. Even apart from the merits, important prudential considerations strongly counsel that the Court should defer consideration of the question presented here. Despite their assertions of a conflict, petitioners ultimately acknowledge that the decision below is the first by a court of appeals to address a McFadden Act challenge to the use of a shared ATM (Pet. 10, 16). There accordingly is no pressing need for further review.[15]

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trolled by the bank." *Id.* at 128. Indeed, before concluding that the bank was engaged in branching, the Court carefully reviewed the facts and noted that the persons operating the truck "were bank employees" (*ibid.*), that the "bank paid the cost of armored car operations and assumed complete responsibility for the monies, checks, and deposits * * * by means of an insurance policy bought and paid for [by the bank]" (*ibid.*), and that the "truck bore the name of the bank and * * * [a]ll movements and routing of the armored car were directed by the bank." *Ibid.* The bank had similar control over the receptacle that the "armored car serviced * * * daily." *Id.* at 129. Thus, the bank itself plainly had established and was operating the off-premises services. For the same reason, petitioners' assertion (Pet. 28) that the decision below conflicts with decisions of other courts of appeals is without merit. As respondents explain (Wegmans Br. in Opp. 4-5; Marine Br. in Opp. 8), the decisions cited by petitioners all involved ATMs owned by a bank.

[15] In addition, further litigation in the lower courts on the application of the Act's branching restrictions to shared ATMs might help in the resolution of additional issues that are intertwined with the question presented here. For example, Section 36(c)(2) allows national banks to branch as permitted by the "statute law of the State in question." In some states—including New York (see Resp. Supp. Br. in Opp. App. 1a-5a; page 17, *infra*)—there also are administrative rules or interpretations that set geographical limitations on ATMs. See N. Penney & D. Baker, *supra*, ¶ 22.01[2], at 22-13 n.41, 22-14 n.44. Questions may be raised as to the applicability of these administrative rules to the activities of national banks. Lower

The necessity for intervention by this Court is further obviated by Congress's continuing interest in the problems posed by the application of the Act (which originally was adopted in 1927) to modern technology. Congress has ordered studies on the matter (see U.S. Dep't of the Treasury, *Geographic Restrictions on Commercial Banking in the United States—The Report of the President* (1981); *EFT in the United States, Policy Recommendations and the Public Interest, the Final Report of the National Commission on Electronic Funds Transfers* (1977)), and has held hearings on possible legislative responses to the branching questions raised by this very litigation. See *Status of ATM's Under State Branching Laws: Hearings on S. 2898 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 98th Cong., 2d Sess. (1984). Indeed, three separate bills currently pending before Congress deal with the precise question presented in this case. See S. 1148, 99th Cong., 1st Sess. (1985); S. 206, 99th Cong., 1st Sess. (1985); H.R. 2099, 99th Cong., 1st Sess. (1985).[16] Pending further legislation, the court of appeals' decision simply maintains the status quo, while safeguarding the reliance interests of the institutions that created and participate in the hundreds of shared

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court analysis of such subsidiary issues, and of their relation to the questions squarely presented in the petition here, would aid the Court if it ultimately decides to consider the applicability of the Act's branching restrictions to shared ATMs. See generally *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977).

[16] One of the pending bills (S. 206) would effectively codify the result reached by the court of appeals. H.R. 2099 and S. 1148 would make state geographical limitations on ATMs applicable to national banks.

ATM systems now in use—reliance interests of which Congress is well aware. See *ATM Hearings* 8, 14, 19, 52-53, 61-63, 106, 111, 150, 161.

The issues presented by this case are, moreover, particularly well suited to legislative, rather than judicial, resolution. As petitioners recognize (Pet. 12-13), the Act was designed principally to ensure competitive equality between state and national banks. See *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 131-134, 136, 138 (1969); *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 258-261 (1966). The application of this principle here, which requires a gauging of the competitive effects of novel and developing technologies, calls for "a determination of economic impact that [courts] are ill-equipped to assess" (Pet. App. 21a). Similarly, both industry practice and banking technology are changing rapidly (see *id.* at 25a); those developments, as the court of appeals noted, raise branching issues that "Congress in 1927 could not possibly have foreseen" (*id.* at 18a). And the background of state law regulating ATMs, against which McFadden Act challenges of the sort at issue here must be resolved, is itself in a state of flux. Compare N. Penney & D. Baker, *supra*, ¶ 22.01[2], at 22-12 to 22-17, with D. Baker & R. Brandel, *The Law of Electronic Fund Transfer Systems* ¶ 22.01[2], at S22-4 to S22-11 (Supp. 1984). All of this suggests that it would be neither easy nor fruitful for courts to impose barriers to the introduction of new technology "based upon definitions framed over 50 years ago" (Pet. App. 25a).

b. It should be added that petitioners significantly overstate the practical effects of the court of appeals' ruling. Petitioners principally contend (Pet. 12-14)

that the decision below will destroy the competitive equality of state and national banks in New York; they suggest that the ruling leaves national banks free to participate in the use of shared ATMs statewide, while the use of shared ATMs by state banks will remain subject to state restrictions such as the home office limitation. The force of this argument, however, has been largely undercut by a significant change in New York banking law that occurred after the filing of the petition in this case. The New York Banking Department has interpreted recent amendments to the New York banking statute (N.Y. Banking Law § 105-a (McKinney Supp. 1986), as amended by 1984 N.Y. Laws ch. 360, § 29) as permitting shared ATMs to offer all banking services on a statewide basis, except for the taking of deposits. See Resp. Supp. Br., App. 3a-4a. The home office protection against competition from shared ATMs provided by state law thus has been largely eliminated. Similarly, the court of appeals' decision will have little impact elsewhere in the Second Circuit: neither Connecticut nor Vermont places any geographical limitations on the location of ATMs. See N. Penney & D. Baker, *supra*, ¶ 22.01[2], at 22-14 n.44, 22-15 n.47; *ATM Hearings* 212.

Even if the Second Circuit's rule were given nationwide effect, it is unlikely that it would have a dramatic impact. As of 1984, a majority of the states—at least 31—permitted unrestricted intrastate use of ATMs. See *ATM Hearings* 29. The Second Circuit's rule would have no effect in these states.[17]

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[17] As of 1984, 13 states imposed geographic limits on the placement of ATMs (*ATM Hearings* 273); eight states treated ATMs as branches (*id.* at 29). As a matter of practice, however, it appears that in these states most ATM networks

Indeed, it is petitioners' approach that would most likely impair the competitive equality of state and national banks. Thirty-six states affirmatively permit state-bank customers to conduct their banking business at out-of-state shared ATMs. See *ATM Hearings* 101. If shared ATMs are treated as branches within the meaning of the McFadden Act, however, national banks would be foreclosed from using them on an interstate basis.[18] Such a result, as the court of appeals noted, would "limit the ability of national banks to compete in the use of major technological developments in this industry, contrary to the Congressional purpose" (Pet. App. 21a).[19]

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were complying with state requirements. See generally *id.* at 281.

[18] Petitioners' suggestion (Pet. 14-16) that the decision below will alter the shape of the nation's banking industry by permitting the nationwide aggregation of deposits is, at best, entirely speculative. National banks and many state banks have now been permitted to use shared ATMs on an interstate basis for some 10 years without undue effects on the industry. Indeed, some shared ATMs do not permit customers to make deposits at all. See, *e.g.*, *ATM Hearings* 10. And it is hardly likely that many customers would choose to bank at an out-of-state institution whose only local presence is a shared ATM—a machine that, by definition, is under the control of a third party such as Wegmans.

[19] This effect should not be overstated, however. Because state banks that are members of the Federal Reserve System are subject to the Act's branching restrictions (see 12 U.S.C. 321), those state institutions, as well as all national banks, would be foreclosed from engaging in interstate banking operations by petitioners' reading of the Act. Respondent Marine also may overstate the effect of petitioners' approach in suggesting that national banks would be disadvantaged on an intrastate basis if shared ATMs were treated as branches under federal law (Marine Br. in Opp. 13-14). Even under

CONCLUSION

The petition for a writ of certiorari should be denied.[20]

Respectfully submitted.

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such a reading of the law, to the extent that state banks were permitted to make unrestricted use of shared ATMs within the state, the Act would permit national banks located in that state to make equivalent use of shared ATMs.

[20] The question in this case is not related to the McFadden Act issue currently before the Court in *Clarke* v. *Securities Industry Ass'n*, cert. granted, No. 85-971 (Mar. 3, 1986). The issue in *Clarke* is whether an office of a national bank that offers only discount brokerage services is a "branch" within the meaning of Section 36(f). Here, it is not disputed that shared ATMs perform the banking functions enumerated in that provision (accepting deposits, paying checks, and making loans). This case, unlike *Clarke*, turns not on the correct definition of "branch" in Section 36(f), but on the construction of the "establish and operate" language in Section 36(c).

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